NO. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF FOR CRIMINAL JUSTICE INSTITUTE OF HARVARD LAW SCHOOL IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Criminal Justice Institute of Harvard Law School is the pre-eminent teaching institution concerning the provision of defense services to indigent defendants. In addition to clinical programs, the Criminal Justice Institute pursues various criminal justice initiatives and engages in broader public education, in areas of constitutional law, research, practice and policy.

SUMMARY OF ARGUMENT

This Court should grant review for all of the reasons detailed in the Petition. *Amicus* respectfully submits this brief to highlight important additional considerations favoring this Court's review.

First, review is warranted because the current circuit split creates an unworkable standard, misinterprets Supreme Court precedent, harms criminal defendants with meritorious §1983 claims, and causes confusion for defendants *and* the courts. The decision below diverges from every other circuit to consider the issue and requires criminal defendants who believe that fabricated evidence has been used against them to file their §1983 suits

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. *Amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

when they "should have known" about the fabricated evidence instead of when the criminal proceedings conclude in the criminal defendant's favor.

The Second Circuit's "should have known" standard harms criminal defendants because it effectively shortens the statute of limitations on §1983 claims for fabricated evidence. The "should have known" standard causes the statute of limitations for these claims to begin running before the criminal proceedings conclude, and forces defendants to either divert attention from their ongoing criminal trials in order to bring a civil action or, more likely, to wait until the trial's conclusion. This standard further hinders criminal defendants from bringing §1983 claims, despite the violation to their rights fabrication of evidence engenders, by creating practical difficulties, including creating challenges to finding competent representation and forcing defendants to bring partial claims. Additionally, the Second Circuit's standard encourages unethical state actors to fabricate evidence against criminal defendants because the chances of being exposed decreases, while harming ethical state actors who will be forced to respond to civil proceedings while in the midst of a criminal prosecution. Moreover, the standard forces courts to engage in a fact-intensive inquiry in order to determine when an individual bringing a §1983 claim had reason to know fabricated evidence was used against him, wasting judicial resources, creating inconsistency, and preventing finality in the process.

Second, the Second Circuit devised the "should have known" standard because it mischaracterized the harm caused to criminal defendants when fabricated evidence is used against them. This Court has recognized that in order to determine the proper date of accrual, we must look to the common law tort most analogous to the claim at hand. Five circuits have understood that fabrication of evidence claims are most analogous to malicious prosecution, stating that in both claims the right at issue is the right to be free from an unjust legal proceeding. However, the Second Circuit disagreed with this consensus and improperly analogized fabrication of evidence claims to false arrest claims. This mischaracterization ignored the immense harm that the *involvement* in criminal proceedings causes to criminal defendants and their families, while also misunderstanding this Court's opinion in *Heck* which makes it clear that the statute of limitations for fabrication of evidence claims does not begin to accrue until the conclusion of the criminal proceedings.

Because the Second Circuit's decision below will create harm to criminal defendants and violates this Court's precedent, the Court should grant review.

ARGUMENT

I. THE CIRCUIT SPLIT CREATED BY THE SECOND CIRCUIT'S INCORRECT DECISION IN *MCDONOUGH* WILL CAUSE TREMENDOUS HARM TO CRIMINAL DEFENDANTS.

For fifteen years, for claims of fabrication of evidence, courts have followed the decision in *Heck v. Humphrey*, which stated that a plaintiff in a §1983 claim may not bring such a claim until his criminal trial has terminated in his favor. *See* 512 U.S. 477, 486–87 (1994). Notably, five circuits have held that the statute of limitations for a §1983 claim based on fabrication of evidence follows this rule and only begins to run *after* the termination of criminal proceedings in the defendant's favor. *See Bradford v. Scherschligt*, 803 F.3d 382, 387-89 (9th Cir. 2015); *Floyd v. Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano v. Fragozo*, 352 F.3d 939, 959-60 (5th Cir. 2003) (en banc); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King v. Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). Additionally, the Seventh Circuit has held that upon the violation of a criminal defendant's constitutional rights the statute of limitations does not begin to run until the constitutional violation ends. *See Manuel v. City of Joliet*, 903 F.3d 667, 669-70 (7th Cir. 2018) ("*Manuel II*").

The Second Circuit, however, in its recent *McDonough* decision, held that the statute of limitations in fabrication of evidence claims begins to accrue when the defendant "should have known"

about the evidence being used against him. *See McDonough v. Smith*, 898 F.3d 259, 266 (2d Cir. 2018). The court ruled this way based on a misunderstanding of the wrong done to a criminal defendant when fabricated evidence is used against him in the legal process. While the court asserted that the harm is more analogous to that which occurs when the tort of false arrest takes place, rather than when there is malicious prosecution, *see id.* at 267, this misunderstands the violation at issue here. Given the Second Circuit's admission that it goes against the majority of other circuits in this decision, *see id.*, the norm among circuit courts to apply the law uniformly, *see United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) (stating that "absent a strong reason to do so, we will not create a direct conflict with other circuits."), and the harm this rule creates for criminal defendants, the Court should grant certiorari to reverse *McDonough* in favor of the correct bright line "favorable termination" accrual rule followed by the majority of circuits and mandated by *Heck*.

A. The Second Circuit Vitiates The Reasoning Behind The Bright Line Rule Set In *Heck* And Creates An Unworkable Standard Potentially Shortening The Statute Of Limitations On §1983 Claims.

The Court in *Heck* established the "favorable termination" accrual rule, which sets forth that, in order to recover damages, a "§1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized

to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *See Heck*, 512 U.S. at 486-87. Under this rule, the statute of limitations for a §1983 claim begins to run only once the criminal proceedings have terminated in the defendant's favor. *See id.*

In *McDonough*, however, the Second Circuit held that *Heck* does not apply to §1983 claims based on fabrication of evidence, incorrectly ruling that fabrication of evidence is analogous to the tort of false arrest, which this Court has held is excepted from the *Heck* rule, *see Wallace v. Kato*, 549 U.S. 384, 393-94 (2007), since "the injury for this constitutional violation [fabrication of evidence] occurs at the time the evidence is used against the defendant to deprive him of his liberty . . ." *See McDonough*, 898 F.3d at 267. Therefore, the Second Circuit held that the statute of limitations begins to accrue when the criminal defendant "should have known" about the fabrication of evidence – even when that is well before the criminal proceedings end. *See id. Heck*, however, was clear: a plaintiff seeking damages in a §1983 claim requires "the district court [to] consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence [and] if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *See Heck*, 512 U.S. at 487. That is exactly the case here. Part II of the brief will explain more in depth why the Second Circuit was incorrect to analogize fabrication of evidence to false arrest, rather than malicious prosecution – as every other circuit to consider the issue has. However, in sum, *Heck* applies to

fabrication of evidence because both fabrication of evidence and malicious prosecution charges center around state actors committing tortious conduct in order to attain a criminal conviction against the defendant. Therefore, in both *Heck* and in the instant case, the harm is ongoing through the end of the criminal proceedings and, as such, any §1983 suit will effectively and improperly imply the invalidity of the conviction.

In essence, the Second Circuit is either requiring criminal defendants to vitiate *Heck*'s reasoning and attack their criminal conviction while the proceedings are ongoing, or to follow *Heck* and forfeit much, if not all, of the statute of limitations. Given Supreme Court precedent, and the fact that the violation of McDonough's rights continued throughout the very taxing criminal trial he was forced to endure, the statute of limitations for his claim should have accrued only three years after the favorable termination of his criminal trial. However, per the Second Circuit's ruling, McDonough's statute of limitations for his §1983 claim began accruing well before *Heck* permits.

B. Even If *Heck* Does Not Foreclose Criminal Defendants From Filing A §1983 Lawsuit While Their Criminal Case Is Pending, The Second Circuit's Decision Should Still Be Reversed.

Even accepting the Second Circuit's logic that the *Heck* bar does not apply to §1983 claims based on fabrication of evidence, this rule would create too much harm for criminal defendants with meritorious §1983 claims and put strains on the courts.

Specifically, it would: 1) hinder criminal defendants' ability to bring §1983 claims; 2) create a complex legal framework for courts to apply, making harsh outcomes for defendants a likely possibility; 3) make it difficult for criminal defendants to find competent counsel; 4) reduce the punishment for the unethical state actors engaging in this fabrication of evidence while harming ethical state actors; 5) encourage defendants to bring partial claims; and 6) cause confusion in the lower courts.

1. The Second Circuit's rule is harmful to criminal defendants by hindering their ability to bring meritorious §1983 claims.

Under the Second Circuit's rule, defendants in the middle of a criminal trial will be forced to file a §1983 claim before they know whether they will be convicted of a crime, and, thus, before they know whether such a claim will be moot. Given the obvious difficulty of filing a civil claim while defending oneself from a criminal prosecution, and for the reasons stated below, this standard effectively shortens the statute of limitations for §1983 claims because defendants will be forced to wait until after the conclusion of their trial to even contemplate bringing a civil action. The Second Circuit's decision therefore infringes on the rights of criminal defendants by reducing their ability to bring civil claims and shortening the statute of limitations if they do.

Moreover, a defendant who suspects the use of fabricated evidence at his criminal trial may not

immediately know that it was intentionally fabricated. The "should have known" standard imputes knowledge onto an individual under intense duress. The point at which the defendant *should* have known is thus likely to differ from when he *did* know. The incredible deference to the court's fact-finding abilities thus not only muddies the process around making §1983 claims and consumes greater judicial resources, but also infringes on the rights of defendants who learn of the fabricated evidence used against them at a later point than when the court determines they *should* have known.

2. The Second Circuit's ruling creates practical difficulties forcing courts to engage in complicated factual determinations likely to negatively affect criminal defendants.

This Second Circuit's standard also creates practical difficulties by requiring a court in a §1983 case to consider events from a criminal defendant's perspective. That is, the court must necessarily consider how clear it was to the individual that some of the evidence being presented at trial was fabricated. While this might seem clear, there are many factors that can make this determination more complicated. For example, considering the trust normally accorded government officials, a typical criminal defendant who hears about fabricated witness testimony will not necessarily suspect that a prosecutor or police officer fabricated evidence. Instead, the criminal defendant will likely believe

the seemingly more plausible theory that a witness has misremembered events or even that he himself has a faulty recollection. While a court may take this and other contextual factors into account when applying the Second Circuit's rule, their failure to do so could have serious implications for meritorious §1983 claims and the defendants who have the right to bring them. Therefore, the Court should remove the possibility all together by reversing the *McDonough* decision.

3. The Second Circuit's standard makes it difficult for defendants to be competently represented by counsel.

As explained above, *McDonough* complicates the process for bringing a §1983 claim for fabrication of evidence and, as a result, makes it more difficult for defendants bringing fabrication of evidence claims to navigate this area of the law. At the same time, the Second Circuit's standard makes it more difficult for these same individuals to obtain competent counsel to assist them.

Many criminal defendants are incarcerated in pre-trial detention – before and during their trials, *see* Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving A Money Bail Problem*, 53 Am. Crim. L. Rev. 799, 799 (2016) ("Pick any day and at least sixty percent of the jail population in the United States is composed of pretrial detainees."), making it difficult for them to find counsel to assist in bringing their §1983 claims. *See, e.g., Wallace*, 549 U.S. at 389

(explaining that incarcerated victims face limitations in bringing §1983 suits). Furthermore, if a criminal defendant is forced to bring his claim before the criminal trial concludes, potential attorneys will not only have inadequate factual information but will also be unsure if the claim will even survive trial. *See Heck*, 512 U.S. at 484–87. That is, if the criminal defendant is convicted, his §1983 claim immediately becomes moot. *See id.* Thus, risk-averse attorneys will be wary to take a case which may not only be dismissed on procedural grounds, but also involve a client unable to pay attorney fees given his circumstances. Therefore, even criminal defendants who are not detained will have trouble finding counsel to assist in their §1983 suits.

As a result, a criminal defendant unable to retain counsel for their §1983 suit may choose to forego their claims altogether, especially if they think that filing a civil claim of this nature could negatively affect the outcome of their criminal trial. Without counsel to inform the criminal defendant of the way the criminal and civil claims interact, the defendant may make ill-informed decisions that prevent him from remedying the violation of his rights that fabrication of evidence causes.

Moreover, even if the criminal defendant finds counsel for his §1983 suit, the counsel will face difficulties in gathering all of the necessary information and building the case with the incarcerated criminal defendant unable to provide substantial help. *See, e.g.*, Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998

U. Ill. L. Rev. 1, 17-22 (1998) (describing the difficulties for counsel in successfully preparing for trial with a client who is incarcerated); *see also* John D. Parron, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 U. Pa. J. Const. L. 137, 151 (2017) ("A defendant who is detained will often have trouble communicating with his attorney and preparing for trial"). Under such conditions, criminal defendants will be discouraged from filing §1983 claims and, when they do, hindered in their ability to be successful.

Conversely, under the rule followed by five other circuits, criminal defendants can be sure that their claims will not be barred if they wait until after their criminal proceedings conclude to file suit. At this time, they will usually not be incarcerated when they have to find counsel and prepare the case, and they will have finished the stressful, time-consuming, and resource-draining event that is a criminal trial, such that they can focus on finding adequate representation to remedy the violation of their constitutional rights.

4. The Second Circuit's rule encourages unethical state actors to fabricate evidence while harming ethical state actors.

Since the Second Circuit's standard makes it more difficult to bring §1983 claims, bad actors who fabricate evidence are less likely to be subject to legal process. As the Second Circuit has stated before, and repeated in *McDonough*, "[t]he forwarding by an investigating officer to a prosecutor

of fabricated evidence, or . . . the alleged creation or use of such evidence by both investigating officers and the prosecutor, 'works an unacceptable corruption of the truth–seeking function of the trial process.'" 898 F.3d at 266 (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)). The Second Circuit's rule however makes it easier for officials to engage in this sort of corrupt action by erecting barriers for defendants to file civil claims disputing this sort of action. The *McDonough* decision therefore reduces the disincentives for rogue state actors to fabricate evidence in order to get a conviction and also infringes on the constitutional rights of the victims of such action by making it harder for them to seek recourse.

On the other hand, ethical state actors who have not fabricated evidence will be harmed by the Second Circuit's decision. Since, under *McDonough*, a criminal defendant who suspects that evidence against him has been fabricated must file suit while the criminal proceeding is outstanding, the prosecution will have to deal with discovery requests, and possibly media attention, regarding the civil suit while still in the midst of the criminal prosecution. Essentially, prosecutors will be forced to defend themselves against discovery requests, and potentially turn over evidence to the defense that they would not have had to otherwise, while they are still prosecuting the criminal defendant. Thus, the Second Circuit's decision in *McDonough* encourages unethical state actors to more blatantly violate the law while punishing ethical state actors who committed no wrongs.

5. The Second Circuit's rule forces defendants to bring partial claims.

The *McDonough* decision will also lead to criminal defendants bringing partial claims because, under the Second Circuit's decision, defendants will file §1983 claims while their criminal trial is ongoing. However, this will occur far before they have had a chance to fully understand the scope of the evidence fabrication. The Second Circuit itself has stated that "piecemeal and wasteful litigation" should be avoided, *see Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, No. 17-cv-0361, 2018 WL 3650826, at *4 (2d Cir. Aug. 2, 2018) (quoting *N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 89 (2d Cir. 2000)), and this is exactly the type of litigation this standard engenders. The Court should seek to deter the filing of a civil claim while a criminal proceeding is ongoing — as the Court enshrined in *Heck* — and thereby discourage the filing of partial claims in a manner that is detrimental to individuals who have had their rights infringed. The Court should thus also grant review to prevent piecemeal and wasteful litigation.

6. The circuit split will cause confusion and uncertainty in the lower courts.

As it currently stands, a defendant who brings a §1983 claim in Jersey City (Third Circuit) could have an extremely different process than a similarly situated defendant who is just across the Hudson River in Manhattan (Second Circuit). This division between the circuits is confusing and harms

potential plaintiffs by making it harder for them to know the law given its inconsistency. *See Landgraf v. Usi Film Products*, 511 U.S. 244, 265 (1994) (noting that "elementary considerations of fairness dictat[e] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."). This uncertainty prevents individuals from knowing the law, which is intrinsically unjust, and will create outcomes that are determined by the circuit in which they occur. The Court should thus also grant review to ensure uniformity and fairness across the circuits.

II. THE SECOND CIRCUIT REACHED ITS DECISION BY IMPROPERLY TREATING FABRICATION OF EVIDENCE CLAIMS LIKE FALSE ARREST CLAIMS, RATHER THAN MALICIOUS PROSECUTION AS FIVE OTHER CIRCUITS DO.

Unlike five other circuits, the Second Circuit concluded that malicious prosecution is not the common law tort analogue for fabrication of evidence claims. This Court has ruled that, in order to determine the proper date of accrual, we must look to the common law tort most analogous to the claim at hand. *See Heck*, 512 U.S. at 483. In other words, "a court evaluates the proper accrual date for a claim by identifying the common law analogue for the §1983 claim and applying any distinctive accrual rules associated with that common law analogue." *Bradford*, 803 F.3d at 388 (citing *Wallace*, 549 U.S. at 389-92) (internal quotations omitted). Instead of following the five other circuits, the Second Circuit incorrectly ruled that false arrest was the

appropriate analogue for fabrication of evidence claims.

A. Malicious Prosecution Is The Appropriate Tort Analogue.

Applying *Wallace*, the Ninth Circuit was the first circuit to explicitly establish that fabrication of evidence claims are most analogous to malicious prosecution actions. *See id.* The Ninth Circuit in *Bradford* explained that the right at issue in a fabricated evidence claim is "the right to be free from criminal charges based on a claim of deliberately fabricated evidence." *Id.* (citing *Devereaux v. Abbey*, 263 F. 3d 1070, 1075 (9th Cir. 2001) (internal quotations omitted). Similarly, the court stated that the tort of malicious prosecution "involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause." *Id.* (citing *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004)). Thus, the critical similarity between malicious prosecution and fabrication of evidence claims is that they are both centered around the right to be free from an unjust legal proceeding.

The *Bradford* court then examined specific accrual rules that apply to the tort of malicious prosecution. *See id.* at 388-89. Looking to a Fourth Circuit case, the court found that malicious prosecution claims do not accrue until the proceedings against the plaintiff have "terminated in such a manner that [they] cannot be revived." *Id.* (citing *Owens v. Baltimore City State's Atty's Office*, 767 F.3d 379, 390 (4th Cir. 2014); W. Page Keeton, et

al., *Prosser & Keeton on Torts* § 119 (5th ed.1984)). Applying this standard to the claim at hand, the court held that fabricated evidence claims do not accrue until the charges against the defendant are "fully and finally resolved." *Id.* at 389.

Indeed, the Third, Fifth, Sixth, and Tenth Circuits all recognized the correctness of the Ninth Circuit's reasoning and followed the rule set forth in *Bradford*. *See Floyd*, 722 F. App'x at 114; *Castellano*, 352 F.3d at 959-60; *Mills*, 869 F.3d at 484 (citing *King*, 852 F.3d at 579); *Mondragon*, 519 F.3d at 1083. In *Floyd*, the Third Circuit embraced the favorable termination accrual rule, stating that a "claim alleging fabrication of evidence" should be treated "in the same way as [a] claim of malicious prosecution." 722 F. App'x at 114. This was again underscored in *Mills*, in which the Sixth Circuit emphasized that the "basis of a fabrication-of-evidence claim under 1983 is an allegation that a defendant knowingly fabricated evidence against a plaintiff, and that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." 869 F.3d at 484.

As the bulk of the case law has established, malicious prosecution is the appropriate common law analogue for fabrication of evidence claims. The most obvious and important similarity between the two is that they both center around the misconduct of state officials, mainly prosecutors or police, to attain a criminal conviction. They both offer a recourse for individuals who have been targeted as defendants in unjust trials. Unlike false arrest, both malicious prosecution and fabrication of evidence

"permit[] damages for confinement imposed pursuant to legal process." *Heck*, 512 U.S. at 484. Lastly, as the *Bradford* court noted, both courses of action protect the right to be free from unfair criminal processes. *See* 803 F.3d at 388.

Moreover, the allegations in *Heck*, which this Court held were analogous to the tort of malicious prosecution, are strikingly similar to the allegations in the case below. The complaint in *Heck* alleged that the prosecutors:

> [E]ngaged in an unlawful, unreasonable, and arbitrary investigation leading to petitioner's arrest; knowingly destroyed evidence which was exculpatory in nature and could have proved [petitioner's] innocence; and caused an illegal and unlawful voice identification procedure to be used at petitioner's trial.

512 U.S. at 479 (citation omitted). The allegations in *McDonough* are that the prosecutor presented to the Grand Jury, and in the subsequent trials, an:

> [A]lleged scheme [that] included using forged affidavits, offering false testimony, and using faulty DNA methods for analyzing materials used in processing the ballot applications, all despite Smith knowing that McDonough was innocent.

898 F.2d at 263-64. The Court in *Heck* did not give a name to the petitioner's claim. Instead, the *Heck* Court simply explained that for "claims of the type considered here" the closest analogy came from the "common-law cause of action for malicious prosecution." 512 U.S. at 484. But when comparing the allegations in *Heck* and *McDonough* it becomes clear that there is little difference between them. Both involve altered evidence used by the prosecution to attempt to obtain a conviction. If the allegations in *Heck* were analogous to the tort of malicious prosecution, surely the allegations here are also analogous to malicious prosecution – and not to the inapposite tort of false arrest.

Thus, the distinctive "favorable termination" accrual rule associated with malicious prosecution should be applied to fabrication of evidence claims as well.

B. The Second Circuit Improperly Treated Fabrication Of Evidence Claims Like False Arrest Claims.

Fabrication of evidence claims are critically different from false arrest claims and should not be treated the same way for accrual purposes. One of the key aspects of both malicious prosecution and fabrication of evidence claims is that they center around the unjust legal proceedings. Indeed, fabrication of evidence is unconstitutional for the very reason that it is a "corruption of the truth-seeking function of the trial process." *Ricciuti*, 124 F.2d at 130 (quoting *U.S. v. Agurs*, 427 U.S. 97, 104 (1976)).

By contrast, false arrest claims bear no relation to the legal proceedings against the accused. This Court recognized this critical distinction in *Wallace*, explaining that false arrest claims "end[] once the victim becomes held *pursuant to [legal] process*--when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the entirely distinct tort of malicious prosecution . . ." 549 U.S. at 389-90 (emphasis in original) (citation and quotation marks omitted). In other words, once lawful proceedings begin against the defendant, the false arrest claim accrues because the false arrest is over. Functionally, there is no overlap between false arrest and fabrication of evidence claims.

Furthermore, since false arrest claims accrue before or as the legal proceedings begin, false arrest claims do not pose *Heck* problems as fabrication of evidence claims do. A criminal defendant is not attacking a criminal conviction through civil action, as *Heck* precludes, since at the time a false arrest claim accrues, there is never an extant criminal conviction. Moreover, it would not make sense to require termination of the proceedings in a manner favorable to the defendant in false arrest cases, because false arrests can still lead to valid convictions. *See Fifield v. Barrancotta*, 353 F. App'x 479, 481 (2d Cir. 2009). On the other hand, fabrication of evidence claims cannot lead to valid convictions because the legal proceedings have been corrupted. *See Riccuiti*, 124 F.3d at 130.

In the *McDonough* decision, the Second Circuit acknowledged that the Third, Ninth, and Tenth Circuits have all held that "the due process

fabrication cause of action accrues only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution . . ." 898 F.2d at 267. Despite this strong consensus, the Second Circuit disagreed, arguing that:

> Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. Indeed, the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.

Id. at 267 (emphasis in original). However, this is a mischaracterization of when the harm to the defendant occurs. *Bradford* established that the right at issue in fabrication of evidence claims is the right to be free unjust criminal proceedings. *See* 803 F.3d at 388. In other words, the harm to the defendant is the *involvement* in the unjust proceedings, not just the *outcome* of the proceedings. This Court acknowledged this distinction in *Heck*, where it stated that the critical wrong of the tort of malicious prosecution is the "wrongfulness of the prosecution," which persists through the "lawful

conclusion" of the proceedings. *Heck*, 512 U.S. at 486 n.5.

The Second Circuit's mischaracterization demonstrates a fundamental misunderstanding about *why* fabrication of evidence is harmful. Indeed, it appears that the *Bradford* and *Heck* courts understood something that the Second Circuit does not: mere *involvement* in criminal proceedings can wreak havoc on a defendant's life, even in the event of a "not guilty" verdict. The Second Circuit's decision dangerously disregards all of the ways involvement in an ongoing criminal trial can harm a defendant.

First, criminal trials can be prohibitively expensive and pose an enormous cost burden for defendants, especially for those who do not qualify for state aid. *See Lafler v. Cooper*, 566 U.S. 156, 175 (2012) (Scalia, J., dissenting) (describing the ordinary criminal process as "too long, too expensive, and unpredictable"). In addition to the costs associated with defending oneself, if the criminal defendant is in pre-trial detention, "it places significant financial costs on detainees and their families, who, in addition to suffering the stigma of having a loved one in jail, are also deprived of the detainee's financial support." Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1356 (2014). Furthermore, many criminal defendants in pre-trial detention, even if it is just for a short time while gathering money to pay bail, lose their jobs and are unable to get them back after gaining freedom. *See id.* Although other countries have awarded court costs and legal fees to criminal defendants acquitted at trial, the United

States criminal justice system does not. *See Costs and the Plea Bargaining Process: Reducing the Price of Justice to the Nonindigent Defendant*, 89 Yale L. J. 333, 334-35 (1979). This leaves a defendant who wins an acquittal few means for recovering the costs of trial. *See id.* at 335.

Second, being a defendant in an ongoing criminal trial is extremely time consuming. Importantly, time spent in court or standing trial is often time spent missing work or school. *See* Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 Fla. L. Rev. 761 n. 44 (1999) ("Defendants . . . often will find that the costs of pursuing a trial-time and *wages lost*, lawyer's fees, etc.-will outweigh the magnitude of the sentence likely to be imposed . . .") (emphasis added). This is particularly damaging for defendants who do not have employers that will let them miss work for court dates or jobs that do not afford them the luxury of flexible schedules.

The defendant's education can also be at risk. In fact, in some states, students can be suspended from school indefinitely while they are under criminal investigation or on trial. *See, e.g.*, Mass. Gen. Laws Ann. ch. 71, § 37H 1/2 (West 2014) ("Upon the issuance of a criminal complaint charging a student with a felony or upon the issuance of a felony delinquency complaint against a student, the principal or headmaster of a school in which the student is enrolled may suspend such student for a period of time determined appropriate by said principal or headmaster . . ."). Every minute spent in an unjust legal proceeding is a minute the student

cannot attend school. Thus, criminal legal proceedings, regardless of their result, can seriously disrupt employment and education.

Third, the psychological stress of being involved in ongoing litigation cannot be understated. Defendants, especially ones who know they are innocent, may feel attacked, frightened, and angry. They may experience damage to their reputation in their community and feel that their character is being assassinated. *See, e.g., O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 803 (1980) (Blackmun, J., concurring) ("[T]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, *and his reputation*.") (emphasis added) (quoting 1 W. Blackstone, Commentaries). Collateral consequences of losing their jobs or families are all at stake. The risk of losing one's liberty is alone incredibly anxiety-producing. The risk of spending years behind bars is so stressful that it can even cause innocent people to plead guilty in hopes of gaining a more favorable sentence. *See, e.g.*, National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/trialpenalty report/ ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose. Faced with this choice, individuals almost uniformly surrender the right to trial rather than insist on proof beyond a reasonable doubt").

Notably, courts have allowed plaintiffs to recover substantial damages for mental and emotional distress from malicious prosecutions, even in the absence of a conviction. *See, e.g., Genovese v. Cty. of Suffolk*, 128 F. Supp. 3d 661, 680 (E.D.N.Y. 2015) (allowing $700,000 damage award for emotional damages stemming from malicious prosecution); *Stampf v. Long Island R. Co.*, 761 F.3d 192, 205-08 (2d Cir. 2014) (awarding $20,000 for emotional damages sustained from a malicious prosecution because "returning to work every day with coworkers who were aware that Stampf was arrested for grabbing another coworker's breast would cause some emotional distress"); *Strader v. Ashley*, 877 N.Y.S.2d 747, 751 (3d Dep't 2009) (same); *Zimbelman v. Savage*, 745 F. Supp. 2d 664, 686 (D.S.C. 2010) (same). These cases act as a window into the psychological trauma of standing trial.

Involvement in litigation is costly, time-consuming, and stressful. For these reasons, it makes practical sense that five circuits would classify the right at hand in fabrication of evidence claims as the right to be free from unjust legal proceedings. The Second Circuit's mischaracterization of the right at hand ignores the multiple ways criminal defendants face harm from the mere involvement in criminal legal proceedings.

Based on this mischaracterization, the Second Circuit improperly analogized fabrication of evidence claims to false arrest claims. This resulted in an inappropriate accrual rule that will cause confusion in the courts and harm defendants. Therefore, this Court should grant certiorari to resolve this issue.

CONCLUSION

For the aforementioned reasons, *amicus*, the Criminal Justice Institute urges this Court to accept the Petition for Writ of Certiorari.

Respectfully submitted,

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